PUBLIC PROSECUTOR

v.

LOH BOON TIONG & AU CHEE KEONG

HIGH COURT MALAYA, KUALA LUMPUR
MOHD. AZMI J
[F.T. CRIMINAL TRIAL NO. 12 & 13 OF 1979]
29 MARCH 1982

CRIMINAL PROCEDURE: *Joint charge - Whether in control of firearms ammunition and explosives - Security area - Manner prejudicial to public security - Internal Security Act 1960 (Rev. 1972) - Sections 57(1)(a), 57(1)(b), Section 58(1).*

EVIDENCE: *Cautioned statements - voir dire - Weight to be attached to cautioned statement one accused electing to give unsworn statement from the dock - Key to locked compartment - Whether within control of accused - Truthfulness of witnesses - Whether defence had created a reasonable doubt in the prosecution's case.*

The 1st accused faced 3 charges. One charge under s. 57(1)(a) of the Internal Security Act 1960 (Revised 1972) for allegedly being in possession of firearms in a security area and 2 charges under s. 57(1)(b) for allegedly being in possession of ammunitions and explosives in the said area.

The 2nd accused was charged under s. 58(1) for being found in the company of the 1st accused who had under his control the firearm, ammunitions and explosives in circumstances which raised a reasonable presumption that he intended to act with the 1st accused in a manner prejudicial to the public.

Acting on information received the police raided an unnumbered squatter house belonging to Ng Koo Ying and Too Ah Sung. In the house they found both the accused and Ng Koo Ying. The two accused were arrested. On a search, the raiding party found the subject matters of the charges in a room allegedly occupied by both the accused.

The explosives were found lying on a table located in the said room which was allegedly under the 1st accused's control. The firearm and ammunitions were locked inside the table compartment.

In respect of the 1st accused, the prosecution has to prove that he not only had 'control' of the locked compartment but also had control of the said room in which the subject matters were found.

Cautioned statements were taken from both the accused. The two accused denied that the statements were theirs.

The prosecution relied on heavily on the possession of the key to the locked compartments to prove it's case which was that after the arrest, both the accused led the police to the said room from which they had come. When asked by ASP Ong who led the raiding party, the 1st accused fetched the key from a trousers hanging in the said room and gave it to him who in turn, handed it to DPC Ahmad Karto with which the said DPC unlocked the table compartment.

The 1st accused defence was that the said room was not under his control. His contractor, one Wong Thin Tuck ('Wong') alias 'Fei Loh' was occupying the said room for some time before the raid. The things found must be his. On the night of the raid, he was in fact sleeping in another room ('H') with the 2nd accused. Both he and the 2nd accused were arrested and never left the hall. He never gave the key to ASP Ong.

The 2nd accused gave an unsworn statement from the dock. He confirmed that both he and the 1st accused were working for Wong. He was staying in room H and he had not seen the 1st accused having a gun when he was staying there.

In the course of the trail a prosecution witness, one Inspector Abdul Hamid testified that ASP Ong told him that the key in question was found on the table.

Ng Koo Ying while testifying for the prosecution said that the 2 accused never left the hall from the time of arrest. She also said that Wong and not the 1st accused was the actual occupier of the said room, though the 1st accused rented it from her.

The prosecution called her husband to prove that the two accused occupied the said room at the material time.

He was in the habit of coming home late and the source of his knowledge on what was happening in the house prior to the raid, almost entirely came from the wife.

Held:

[1] Having regard to the unsatisfactory nature of the prosecutions case in the light of the evidence in totality, the Court would attach no weight at all to the contents of the 2 cautioned statements.

[2] Having heard and seen the witnesses, the Court accepted the testimony of inspector Abdul Hamid about the recovery of the key. His evidence was also consistent with the police report lodged by ASP Ong wherein there was no mention of the key or trouser hanging on the wall nor was there mention of any key being recovered from the 1st accused.

[3] Though the said Ng Koo Ying was not a very satisfactory witness due to various contradictions in her evidence, the Court accepted her evidence that the 2 accused never left the hall from the time of arrest. The Court also found that the evidence of the 1st accused giving the said room to Wong well before the raid was further corroborated by the said Ng Koo Ying.

[4] The Court found at the time of the arrest that ASP Ong and DPC could not possibly have seen both the accused coming out of the said room. From their position at the time of arrest it was likely that they had come from room 'H'.

[5] In the circumstances the Court found that there was grave doubt that the 1st accused was in control of the subject matters of the charge. The 1st accused was found not guilty on all 3 charges and consequently the 2nd accused must of necessity be found also not guilty of the charges under s. 58(1) or 58(2) of the Act.

[Both the accused were acquitted and discharged.]

Legislation referred to:
Essential (Security Cases) (Amendment) Regulations 1975, regs. 10(2), 17, 21(1)
Internal Security Act 1960, 57(1)(a), (1)(b), 58(1), (2)

For the public prosecutor - Gooi Soon Seng, DPP
For the first accused - Sidney Augustin, retained.
For the second accused - Karpal Singh, retained, and Ngeow Yin Ngee, retained.

JUDGMENT

Mohd. Azmi J:

The two accused are charged for security offences under the Internal Security Act 1960 (Revised 1972) and are tried jointly on a certificate issued by the Public Prosecutor under reg. 10(2) of Essential (Security Cases) (Amendment) Regulations 1975. For easy reference, Loh Boon Tiong @ Ah Man is referred to as the "first accused", whilst Au Chee Keong as the "second accused". The first accused faces one charge under s. 57(1)(a) and two charges under s. 57(1)(b) of the Internal Security Act, and the second accused faces one charge under s. 58(1) of the same Act. On the first charge, the first accused (Loh) is alleged to have under his control a Llama .32 pistol (Exhibit P5) without lawful authority in a security area on 19 March 1977 at about 11.30 p.m. at an unnumbered squatter house, off Jalan U Thant, Kuala Lumpur. On the second charge, he is alleged to be in control of 43 rounds of .32 ammunition (Exhibits P6 and P26) and 3 hand grenades (Exhibits P4C, P4D and P31) without lawful authority at the same date, time and place. In the third charge, he is alleged to have in his control explosives, to wit, 3 sticks of N.G. Dynamite (Exhibit P8) and 2 coils of safety fuse wire (Exhibit P9) and 2 fuses (Exhibit P10A). The second accused is charged with being found in the company of the first accused who had under his control of the said pistol, ammunition and explosives at the same time, place and date, in circumstances which raised a reasonable presumption that he intended to act with first accused in a manner prejudicial to public security.

From the evidence, the prosecution's case may be summarised as follows. On 19 March 1977 at about 11.30 p.m. on information received, a Special Branch police party of eight men led by ASP Ong Chong Watt (PW1) raided an unnumbered squatter house, off Jalan U Thant, Kuala Lumpur, belonging to Ng Koo Ying (PW7) and her husband Too Ah Sung (PW10). After the house was surrounded, ASP Ong with two other officers entered the house by surprise, by forcing open the front door. In the house, they found the two accused and the house owner Ng Koo Ying. On a search, the riding party found the subject-matters of the charges in a room occupied by both accused - room marked 'A' in sketch plan (Exhibit P21). The subject-matters of the first and second charges were found in a locked compartment of a table in the said room, and the subject-matters of the third charge were found on the table itself. The room was rented to the first accused and the key of the table compartment was recovered from the first accused; and, as such, he is alleged to be in control of the incriminating exhibits, and the second accused who was found with him at the material time is alleged to be in circumstances which raise a reasonable presumption that the second accused intended to act with him in a manner prejudicial to the public security. The exhibits recovered were kept in the custody of Inspector Ab. Hamid (PW9), the investigating officer,

who caused them to be examined by Mr. Harcharan Singh Tara (PW5), the government chemist, who prepared three separate reports (Exhibits P28, P29 and P30). The hand-grenades were examined by an Armament Officer, ASP Yusof bin Ahmad (PW6), now retired, and the explosive content of one of the three primed grenades was extracted by ASP Wong Ban Foo (PW4), another armament officer, for purpose of analysis by the government chemist. The case being classified under the Internal Security Act, the two accused were kept in the custody of Police Special Branch at all relevant times except on 2 June 1977 when they were handed to CID Officer, Inspector Poh Boon Wah, who recorded cautioned statement from each of the accused. After holding a trial within trial, I find both statements (Exhibits P35 and P36) have been made voluntarily to Inspector Poh (PW8) and rule that they are admissible under reg. 21(1) of the Essential (Security Cases) (Amendment) Regulations 1975.

In this case, it is not challenged that the unnumbered squatter house off Jalan U Thant referred to in all the charges is in a security area as proclaimed by the Yang Di-Pertuan Agong *vide* P.U. (A) 148 dated 15 March 1969. It is also not seriously contested that the subject-matters of the three charges against the first accused were recovered from the room marked 'A' and are "firearm", "ammunition" and "explosive " within the meaning of s. 2 of the Internal Security Act 1960. I accept the evidence of the government chemist (PW5) that the Llama pistol (Exhibit P5) referred to in the first charge and 43 rounds of .32 ammunition (Exhibits P6 and P26) referred to in the second charge are serviceable. From the evidence of the two Armament Officers (PW4 and PW6) and the analysis of the government chemist, I also find that the three handgrenades referred to in the second charge, are complete grenades and are also serviceable. From the evidence of the government chemist, I am also satisfied that the three sticks of N.G. Dynamite Exhibit P8, the two coils of safety fuse wire Exhibit P9 and the two fuses (P10A) referred to in the third charge are "explosives" within the meaning of the Act.

In my view, the only issue for determination, as far as the first accused in concerned, is whether the firearm in the first charge, the ammunition which, by definition, include handgrenades, in the second charge, and the explosives in the third charge, and the explosives in the third charge, have been proved by the prosecution to be under his control at the relevant time of the police raid. At the close of their case, I find the prosecution have established a *prima facie* case that all the incriminating exhibits were under the control of the first accused. In the absence of evidence in rebuttal, the evidence of ASP Ong (PW1) and DPC Ahmad Karto (PW2) that the first accused was in possession of the key (Exhibit P7B) to the locked table compartment in which the subject-matters of the first and second charges against the first accused were found, is sufficient to establish *prima facie* evidence that he had exclusive control of the compartment and had knowledge of its contents. As regards the subject-matters of the third charge, which were found lying on the table, there is also sufficient *prima facie* evidence of ASP Ong, the DPC and the land-lady's husband PW10, that the first accused was the occupying tenant of room 'A' and as such he was in control of all the incriminating exhibits recovered therein. The two cautioned statements which had been admitted after a trial-within-trial was conducted, also support that the first accused was in control of the exhibits. Further, when the two accused were arrested in the hall of the house, the only adult found in the premises at the relevant time was PW7, the landlady.

Having regard to the various subversive exhibits found lying in the room including a communist flag and a sack of communist documents and boxes of empty firearm magazines and empty grenade casings, any occupier of that small room must necessarily have knowledge of their existence. At the close of case for the prosecution, I find that they have established a *prima facie* case that the first accused was occupying room 'A' as a tenant and that the key to the locked compartment was found in his possession and that the subject-matters of the three charges were therefore under his control. I therefore call for his defence on all the three charges.

As regards the second accused, it is submitted on his behalf that, if at all, his defence should be called under s. 58(2) and not under s. 58(1) of the Act. I disagree with this submission. From the evidence, I am satisfied that the circumstances of the present case do raise a reasonable presumption that the second accused intended to act with the first accused with reference to the firearm, ammunition and explosives in a manner prejudicial to public security. A *prima facie* case has therefore been established against the second accused under s. 58(1) of the Act, and I accordingly call for his defence as well.

Although originally both accused have elected to give evidence on oath, the second accused eventually elected to give unsworn statement from the dock.

In his testimony, the first accused denied that any of the incriminating exhibits were under his control. On the night of the police raid, he maintains that he was not aware that there was anything against the law in room 'A'. According to him, that night he was sleeping in room 'H' with the second accused and room 'A' was not under his control. When he heard loud banging on the front door, he woke up to open it, but before he could do so, the raiding party had forced their way in. He and the second accused were kept under guard in the hall of the house near the front door together with the landlady PW7, who had by then come out of her room marked 'I' in the sketch plan. After producing his identity card to ASP Ong (PW1), his hands were tied and he remained in the hall throughout until he was taken to the police station. He denies ASP Ong's evidence that he had given the key (Exhibit P7B) to the table compartment after his arrest in the house. It is his defence that whatever things found in room 'A' by the police must be belong to his contractor named Wong Thin Tuck alias "Fei Loh" - meaning "fat man" - because Wong was occupying that room for a considerable time before the raid. As regards his cautioned statement (Exhibit P36), he denies making it. His version is that he merely said "yes" to whatever was put to him by Inspector Poh (PW8), and as such in effect the cautioned statement contains Inspector Poh's own statement, notwithstanding the acknowledgment made by him on the document, both by thumbprint and signature. He also said the contents of the statement are not true.

In his unsworn statement from the dock, the second accused confirms that both he and the first accused were working for Wong. When he went to stay in the house, he was staying in the middle room and therefore not room 'A' which is the rear room. When he was staying there, he had not seen first accused having a gun. As regards the cautioned statement (Exhibit P36), at the time of recording by Inspector Poh, he merely said 'yes' to the questions asked, and the statement given was therefore not his.

As required by reg. 17 of the Essential (Security Cases) (Amendment) Regulations 1975, the Court shall decide on the guilt or innocence of the accused upon hearing and considering the evidence of both the prosecution and the defence as a whole, having regard to the justice of the case. In the present case, since the two accused were arrested in the hall of the house, it seems clear that the prosecution are relying heavily on possession of the key (Exhibit P7B) to prove not only "control" by the first accused of the locked compartment - which contained the subject-matters of the first and second charges - but also to prove "control" of room 'A' where the table compartment was found. It does not seem to be part of the prosecution case that the second accused was also in control of room 'A'. Otherwise, he too would have been charged under s. 57(1)(b) of the Act for being in control at least of the subject-matters of the third charge, which were found lying on the table in the room. Instead, the second accused is charged under the lesser offence of being found in the company of the first accused, an offence under s. 58(1). Therefore, the padlock key (Exhibit P7B) forms a vital part of the prosecution case to connect the first accused with the crime apart from occupancy of room 'A'. As such, the importance of the denial by the first accused that he had handed the compartment key to ASP Ong cannot be underestimated. On careful analysis of the whole evidence, I have now come to the conclusion that both ASP Ong (PW1) and DPC Ahmad Karto (PW2) are not telling the truth when they testify that it was the first accused who fetched the key from a trousers hanging on the wall in room 'A' and handed it to ASP Ong who, in turn, handed it to DPC Ahmad Karto with which the DPC unlocked the table compartment. This piece of very incriminating evidence has been materially contradicted by the investigating officer, Inspector Ab. Hamid (PW9), who categorically testifies under cross-examination that when he arrived at the scene on the morning of the incident, ASP Ong handed to him, *inter alia*, a padlock and key (Exhibits P7A and P7B) and told him that he got the key from the table. According to inspector Hamid, the ASP produced the exhibits from his pocket. Under re-examination by DPP, Inspector Hamid confirms what ASP Ong had told him about the recovery of the key from the table, although subsequently when the ASP's statement was recorded in the course of police investigation, he appeared to have changed his story and stated that he had recovered the key from the first accused. Having heard and seen the witnesses, I find Inspector Hamid to be a sincere and truthful witness, and I accept his evidence about the recovery of the key, as described by ASP Ong to him at the scene to be the truth. Although the incident took place five years ago, the possibility of Inspector Hamid having made a mistake can safely be ruled out, as the key forms a vital part of prosecution case; and being the investigating officer, it is unlikely that he would forget such an important matter. Inspector Hamid's testimony is also consistent with the police report lodged by ASP Ong on 20 March 1977 where in listing the exhibits recovered during the raid on 19th, there is no mention of the key or trousers hanging on the wall. Nor is there mention of any key being recovered from the first accused. In the circumstances, I accept first accused's denial in his testimony about handing the compartment key to ASP Ong. The only reasonable inference to be drawn is that the locked compartment must have been forced open, which incidentally is consistent with PW10's evidence who personally saw the state of the table compartment after the raid. Having considered the evidence in its totality, a serious doubt has been cast on the prosecution case on all the three charges against the first accused on the issue of control of the exhibits. From the testimony of ASP Ong and DPC Ahmad Karto, it seems to me that their evidence regarding

recovery of the key is a clear attempt to clothe the first accused with control of the locked compartment, but possession of the key by the first accused has been proved to be untrue to my satisfaction.

In this case, both ASP Ong and DPC Ahmad Karto have been found to be misleading the Court in an important issue. In the circumstances, particularly in a case involving capital punishment, the rest of their evidence must be treated with extreme caution. Apart from the key, the prosecution also allege that the first accused was an occupier of room 'A' at the time of the raid and therefore was in control of the exhibits. According to the ASP and DPC, after entry to the house, they saw the two accused in the hall wearing only their underpants. After arresting them, the two accused led them to room 'A' from which they had come. In the presence of the accused, they searched the room. It was at that juncture that ASP Ong found locked table compartment. When he asked for the key to the compartment, the first accused gave him the key (P7B) which he fetched from the trousers hanging on the wall. But, this is denied by the first accused and his evidence that all the time he and the second accused were kept under guard in the hall of the house, is supported by the landlady (PW7). Although PW7 is not a very satisfactory witness due to various contradictions in her evidence, on this particular point, I accept her evidence about the two accused never leaving the hall from the time of their arrest and therefore could not have led the police to room 'A'. I also find the defence version of the incident consistent with Inspector Hamid's evidence that the key was found on the table and that the first accused could not therefore have given the key to ASP Ong in room 'A' as he never entered the room at all. Having regard to the unsatisfactory nature of prosecution case in the light of the whole evidence, I attach very little weight to the contents of the two cautioned statements. On balance of probabilities, there must be truth in first accused's evidence that the contents of Exhibit P36 pertaining to control of the room and the exhibits are not true, and I also accept second accused's statement that his cautioned statement Exhibit P35 is not in reality his. In any event, having considered the evidence in its entirety, I place no weight at all on the contents of the two statements.

On balance of probabilities in the evidence, the defence has created a reasonable doubt in the prosecution's case, and that it is my finding that at the material time, the two accused were not the occupiers of room 'A', but the room was in fact occupied by Wong Thin Tuck @ Fei Loh. The prosecution concedes that Wong is not a fictitious person. He and his family have stayed in that house as testified by the landlady PW7 and her husband PW10. It should be noted that PW10 was called by the prosecution when PW7 started to change her story as to the occupier of room 'A' at the time of the raid. It is her final testimony that Wong and not the first accused was the actual occupier of room 'A' at the material time although the first accused had rented the room from her. In consequence, the prosecution called her husband (PW10) to prove that the two accused occupied the room at the material time. But the testimony of PW10 does not help the prosecution very much. He was always absent from the house as he was in the habit of coming home very late at night. The source of his knowledge on what was happening in the house prior to the raid, almost entirely came from his wife, particularly on tenancy and occupancy of rooms. PW10 only knows that the first accused was the tenant of room 'A', but does not really know whether he was occupying it at the relevant time. In this connection, I find the evidence of the first accused giving up room 'A' to Wong before the police raid is corroborated by the landlady's evidence, although

the landlady's husband (PW10) does not seem to be aware of such an arrangement between Wong and the first accused. Having regard to the whole evidence, it is my finding that there is only suspicion that the two accused were occupying the room at the material time. At the time of their arrest in the hall, ASP Ong and the DPC could not possibly have seen them coming out from 'A'. From their position at time of arrest, it is equally likely that they had come out from room 'H' as they claimed. Not a single item of personal belongings like clothing or the trousers allegedly found hanging on the wall has been produced to show that the first accused was the occupier of room 'A' at the material time. But, from what his wife had told him, PW10 confirms to some extent that Wong had been to carry boxes like Exhibits P17 and P18 into the house prior to the raid. This is consistent with the first accused's testimony what Wong and not he was the occupier of room 'A' and that he had no control of the things found in the room and, much less, the firearm, grenades and ammunition found in the locked table compartment.

In the circumstances of the case, I find there is grave doubt that the first accused was in control of the exhibits as alleged in the three charges. I find the first accused not guilty on all the three charges. He is acquitted and discharged on all the three charges. Consequently, the second accused must of necessity be found also not guilty of the charge under s. 58(1) or 58(2) of the Act. He too is acquitted and discharged.

Also found at [1989] 2 CLJ 1034